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Book Review. Lions Under the Throne by C. P. Curtis, Jr. and The Nine Young Men by W. McCune

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BOOK REVIEWS

LIONS UNDER THE THRONE. By Charles P. Curtis, Jr. Houghton-Mifflin Co., Boston, 1947. Pp. 361. $3.50.

THE NINE YOUNG MEN. By Wesley McCune. Harper & Bros., New York, 1947. Pp. 293. $3.50.

These two books have by now been reviewed so often that a new reviewer is compelled either to review the reviews or to talk about something other than the books. Herewith is a little of each.

1.

The McCune book is a miscellany of accounts of recent Supreme Court decisions interspersed with biographical chapters on each member of the present Court. It also contains a chapter "covering" in 13 pages a few anecdotes and six recent Justices. It is, in the words of Professor Rostow, "a relatively harmless and gossipy piece of journalism, designed to give the lay public some idea of who the justices are, and what they are doing." [1] The best that can be said has been said by Professor Rodell: It "could well serve as a starting-point and a handy warehouse for anyone anxious to take on a more ambitious task." [2]

This reviewer, having made more than his own share of factual mistakes, must concede that error comes easy, particularly in historical writing. Such mistakes can easily result from momentary mental lapse and may not be at all serious—Mr. Curtis' insistence that the Minnesota Milk Cases involved an Illinois statute is an example of a sort of mental typographical error.[3] Enough such slips occur even when great care is used, and hence great care ought to be used. The McCune book is chockfull of trifling errors, regrettable particularly in a book whose main value is informational. As a layman's book it is, despite the slips, one of the better summaries.

The Curtis book is quite different, though it sketches many of the same events. It is informational, but it has ideas enough to compensate the professional reader who makes his way through a familiar summation of Old Deal decisions and the Court fight. This is no criticism of the book, which is written for the 99 per cent of us who can't recall offhand just what the *Carter Coal* case was about. The book does not stop with 1937, and its most stimulating passages deal with recent cases.

At times, Curtis, in his effort to write for laymen, may underestimate them. The Curtis style admits of fair difference of opinion. Professor Braden thinks "superb prose" what Professor Rostow considers "archness of style" and Professor Rodell terms "chopped-sentence chit-chat." [4] I found the Curtis mannerisms of the abbreviated sentence and rhetorical question a serious interruption to easy reading.

1. Rostow, Book Review, 56 YALE L. J. 1469, 1473 (1947).
2. Rodell, Book Review, 56 YALE L. J. 1462, 1463 (1947).
3. CURTIS 277.
4. Book Reviews, 56 YALE L. J. 1467, 1470, 1463.

2.

Professor Rodell thinks that Curtis has made Justice Frankfurter the hero of his book, and draws some conclusions from that belief. This seems to me wrong. Grant that Curtis chooses to oversimplify a nine-man Court into three men and a ghost; for under his treatment the cast is almost entirely Black, Frankfurter and Jackson, with the shade of Holmes as the omnipresent off-stage noise.[5] Grant that he largely omits consideration of the economic aspects of the Court's work, that he talks about theories of sovereignty, that he thinks pretty well of Professor Thomas Reed Powell—in short, grant that he has a good many points of view in common with Mr. Justice Frankfurter. Nonethless he divides laurels. If the book is a race for honors, Justice Frankfurter "wins" Chapter XVI on personal liberties, but Justice Black "wins" so much of Chapter XIV as deals with state taxation affecting commerce. One would suppose from the Curtis expressions at pages 215 and 224 that he would say of the Frankfurter opinion in *Freeman v. Hewit*,[6] invalidating an application of the Indiana gross income tax last year, "By what authority?"

In short, Curtis is no carbon copy. He deserves to be answered on his own principles, and on some of those principles he seems to this writer exuberantly wrong.

3.

One problem deservedly puzzling to Mr. Curtis is the extent to which the intent of the founders, the meaning of the Constitution in 1789, should influence contemporary decision. His general point of view is expressed in his first chapter sub-heading: "The limited usefulness of history and the irrelevance of our forefathers' intentions."

This view he would apply when dealing with punishment for contempt of court by the press. Thus *Bridges v. California*,[7] limiting the power of judges to punish for contempt those who criticize the judges' acts, is scorned as "antiquarian."[8] Just why is not wholly clear from the text.

Yet when Curtis desires to criticize such a view as this, or the minority view as to right to counsel in state criminal prosecutions, his scorn for history deserts him. Like most of us, he uses the historical argument when he finds it on his side. Of right to counsel he says that, in the 18th Century, states did not require counsel for the indigent; that English practice up to 1836 was so and so; that the Sixth Amendment was an innovation. "So"—and note that Curtis' conjunction with history is a therefore—"So, when a case came up where a judge in Carroll County, Maryland, refused to assign counsel to a poor defendant . . . the Court refused to intervene,"[9] and refuses yet with the Curtis blessing. Similarly as to contempt, "Historically judges have always had this power . . ."[10]

Constitutional history should not thus catapult from argument's glory to argument's disgrace depending upon which page of the book one reads. This may be unfair to Curtis, because he is not primarily interested in the relation of American legal history to current problems, and if he were, he

5. Quite literally, CURTIS 200-201.

6. 329 U. S. 249 (1946).

7. 314 U. S. 252 (1941).

8. CURTIS 289.

9. *Id.* at 287-288.

10. *Id.* at 291.

would doubtless refine his analysis. But refinement it needs, for the function of yesterday's events in relation to today's lawsuits calls for highly selective judgment. A few off-hand classifications may be ventured:

(1) Some Constitutional phrases were so obviously written in the context of a world different from our own that the exact meaning of the Founding Fathers is merely a historical curio. Both Marshall and Hughes uttered the abstraction that Congress may regulate that which "affects commerce," but these utterances 113 years apart of course did not refer to the same things. Marshall probably would never have believed in 1824 that Congress had power to regulate wages in an office building. As conditions change meaning changes.

(2) There are also Constitutional clauses, as Chief Justice Hughes pointed out in the *Blaisdell* case,[11] in which meaning does not change no matter how much conditions change. For example New York now has roughly four times as many citizens as the 13 states of 1787 put together, but it still can have only two Senators.

(3) There are also deliberately ambiguous clauses—the buck passes of the Constitutional Convention. Some such clauses are well described by Curtis in his first chapter. They are the clauses in which the Founders were unable to agree and codified their uncertainty so as to get on to the next point. Curtis' example of Art. IV, sec. 3, concerning admission of new states, is a good one.

(4) Only a shade different are the clauses which are deliberate abstractions not because agreement was politically difficult, as in the preceding paragraph, but because the Fathers knew they could not entirely foresee future problems, and thus used broad terms for the purpose of leaving their full content open. "Cruel and unusual punishments," or "unreasonable searches and seizures" are examples. These phrases, by their generality, invite the addition of meaning. Assuming that the Eighth Amendment may be included within the Due Process clause of the Fourteenth, the Delaware and Maryland whipping posts should now be "cruel and unusual punishment" regardless of the status of corporal punishment in 1789.

(5) The broad goal phrases form another group. These are the terms which describe general objects of a sort in which our world is not so changed from that of 1789 as to have robbed the words of meaning. Most of the Bill of Rights is an example. Commerce in 1948 may be unrecognizably more complex than in 1788, but people still talk and pray in pretty much the same ways, and their words and prayers are still suppressed in pretty much the same ways. The Constitutional phrases thus set a minimum for decent conduct. Yet this is a minimum, not a maximum. It is a minimum because the phrases are sufficiently general to permit of allowance for change of conditions. One such change is the development of variant methods of suppression, as for example driving persons out of their jobs because of their political views. Another is the rising moral standard of the community, a standard implicit in Cardozo's reference to the concept of "ordered liberty."

(6) There are also Constitutional phrases of general clarity which are rendered ambiguous in particularly novel situations. This group cuts across the others. For example, the clause in Article I giving Con-

11. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934).

gress power "to exercise exclusive legislation in all cases" over the District of Columbia is about as specific as words can be as to the general control of the District. In 1940, Congress sought to utilize this power to permit District residents to use the diversity jurisdiction of federal courts outside the District.[12] (This power is not given such citizens under Article III, say the decisions, because the District is not a "state.") The history of the District clause shows that the Founders never thought about this exact problem, although the discussion in the Virginia ratifying convention makes quite clear that they did not intend the District Clause to permit Congress to exercise any powers outside the District itself.[13] The statute illustrates that there are Constitutional clauses as specific as the Convention could make them, which still leave problems of interpretation in which historical research is indicative but not conclusive because a possible use of the clause never occurred in 1787.

This sort of analysis may itself be all wrong without affecting the underlying thesis that the relevance or irrelevance of constitutional history to current problems depends upon the particular clause, and indeed even upon the particular problem within a clause. Curtis to the apparent contrary on both points, our forefathers' intentions are not generally an "irrelevance;" and at the same time a man should not be tried without counsel in 1948 because state-appointed counsel may not have been "generally regarded as an inherent fundamental right" in 1789.[14] Whether the Sixth Amendment is treated as a broad goal phrase in the fifth category above, or whether the measure is as Mr. Curtis states it, "a common sense of justice," [15] the fairness of a criminal trial should not depend upon whether the defendant is a man of means.

The most articulate, if not the most applied, portion of the Curtis theory of law and history is his conviction, expressed in his first two pages, that we are "getting older and wiser;" that our forefathers made plans but that "there is no reason why we should feel we have to carry out their plans for us;" indeed, "They may sit in at *our* councils. There is no reason why we should eavesdrop on theirs."

Though we may loosen our bonds with the past, we should not gambol quite so freely. For the storm is coming, and much that we prize may be swept away if we do not hold with relentless tenacity to some plans our forefathers made for us. Else we may have only that historian's consolation which Jefferson expressed when he observed on the momentary destruction of speech and press in the administration of Adams, "It is still certain that tho' written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people: they fix too for the people principles for their political creed." [16]

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12. 54 STAT. 143 (1940).

13. There was in 1788 a genuine fear that Congress might grant District residents special privileges outside the District, an argument which was countered with the assurance that "This exclusive power is limited to that place solely." Remarks of Pendleton in 3 ELLIOT, DEBATES IN THE STATE CONVENTIONS 440 (2d ed. 1901). *Cf.* comments of Mason, *id.* at 431, and discussion generally, *id.* at 430-440.

14. CURTIS 288.

15. *Ibid.*

16. Jefferson to Priestly, June 19, 1902, 5 Doc. HIST. CONST. 259-260 (1905). For a criticism of slavery to historical research, see Frank, *The United States Supreme Court 1946-47,* 15 U. OF CHI. L. REV. 49, 50 (1947).

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